

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRENTT E. BUSCH)	
Claimant)	
VS.)	
)	Docket No. 256,751
DIAMOND ENGINEERING)	
Respondent)	
AND)	
)	
ST. PAUL FIRE & MARINE INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appeal from a preliminary hearing Order entered by Administrative Law Judge John D. Clark on August 29, 2000.

ISSUES

The Administrative Law Judge granted claimant's request for preliminary hearing benefits consisting of medical treatment, payment of past medical expenses and temporary total disability compensation. On appeal, respondent seeks review of the Judge's findings that claimant was injured out of and in the course of his employment with the respondent on June 7, 2000 and each and every working day through June 16, 2000, and that respondent had actual notice of the claimant's injuries within the 10-day time limit.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Order should be affirmed.

Claimant worked for respondent approximately one and a half years as a directional bore machine operator, laying underground telephone cable. His job duties included hand digging. During the week of June 5, 2000 claimant started having low back pain. He described the onset of the pain as a couple of days after starting the June 5 work week. Although there was no particular incident that precipitated his symptoms, claimant related that he had been doing a lot of hand digging that week.

Claimant reported to one of his supervisors, Gene Slinkard, that he thought he had pulled a muscle in his back, but he continued working. About a week later, during the week

of June 12, claimant called his supervisor to report that he did not think he would be able to work that day because of his back, but was persuaded to come in and give it a try, which he did. As claimant continued working, his pain increased. By Friday, June 16, 2000 claimant's symptoms included a pinching sensation in his back going down his left leg. Claimant was scheduled to be off work the following Monday, but on Tuesday, June 20 or Wednesday, June 21, claimant called and informed his supervisor that, due to his back pain, he was unable to work and was seeking medical treatment.

Respondent contends claimant's testimony about the injury and notice is not credible because of some inconsistencies concerning dates and days of the week. Furthermore, two of claimant's supervisors, Gene Slinkard and Dennis Wheeler, testified contrary to claimant's version of when and how he reported his injury. Respondent contends that the first date claimant called to report a work related back injury was a telephone call to Mr. Wheeler on June 21, 2000. Respondent further challenges the sufficiency of the evidence to establish an each and every working day aggravation up through June 16, 2000, the last day claimant worked.

While respondent is correct that the record does not contain any medical opinion that claimant suffered an aggravation each and every working day, claimant's testimony supports this finding. Claimant testified to a gradual worsening of his symptoms as he continued to work, not only as to the severity of the back pain but also that the symptoms began to radiate down his leg by June 16, his last day at work. Furthermore, claimant was able to continue working through June 16. He then determined that he needed to seek medical treatment, which he did on Monday, June 19, 2000. The office notes of Dr. Charlie G. Joslin for that date, however, fail to mention that the condition is work related. Dr. Robert L. Eyster's report of June 26, 2000 refers to "a bending injury about 06/05/00." The first documented mention of a work related aggravation or worsening is in the August 10, 2000 history taken from claimant by the physical therapist at Nova Care Rehabilitation, Christy Thompson.

The issues raised in this appeal turn primarily on the credibility of the witnesses' testimony. If claimant is believed, his testimony supports a finding that his work caused an onset of low back pain on or about June 7, 2000, which worsened each and every working day through his last day worked of June 16, 2000. Respondent admits that it received notice by June 21, 2000, which is within 10 days of claimant's last day of work and thus, his date of accident for a series of traumas. While respondent points out several inconsistencies which tend to undermine claimant's testimony somewhat, it is significant that the ALJ observed the in-person testimony of all the witnesses and believed the claimant. The Board generally gives some deference to an ALJ's evaluation of the credibility of witnesses whom he or she had the opportunity to observe while testifying. In this case, respondent offers no testimony that would directly contradict claimant's explanation for how he was injured. Although respondent does offer evidence that claimant did not report his injury or symptoms in the manner or at the times when claimant said he did, these inconsistencies could be explained by imperfect memories or by simply

not placing a great deal of significance to complaints of minor aches or pains from a person who regularly performs heavy manual labor. Furthermore, as stated, timely notice is not an issue for a June 16, 2000 accident. Claimant's testimony concerning his injury from work is consistent with the type of work he performed and there is nothing in the record to suggest an alternative explanation for the injury. Considering the record as a whole, the Board agrees with the ALJ's determination that claimant's testimony is credible and a compensable claim has been proven.

As provided by the Act, preliminary hearing findings are not binding but are subject to modification upon a full hearing on the claim.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge John D. Clark on August 29, 2000, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November 2000.

BOARD MEMBER

c: David L. Nelson, Wichita, KS
Vincent A. Burnett, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director